Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Petition for Declaratory Ruling that	)	WC Docket No. 03-45
pulver.com's Free World Dialup	)	
is neither Telecommunications nor a	)	
Telecommunications Service	)	

REPLY COMMENTS OF THE ELECTRONIC FRONTIER FOUNDATION

The Electronic Frontier Foundation ("EFF") submits these reply comments in the above-referenced matter. EFF supports pulver.com's contention that pulver.com's Free World Dialup ("FWD") service is neither "telecommunications" nor a "telecommunications service" within the meaning of the Telecommunications Act. EFF also supports pulver.com's request for prompt grant of pulver.com's petition because such grant would not materially affect or prejudge issues raised in other pending proceedings before the Commission.

I. Background

As EFF understands it, FWD is a no-cost enhanced directory service that offers Internet broadband users the ability to locate other FWD subscribers who are available for computer-to-computer voice-over-IP ("VOIP") communications using the Session Initiation Protocol ("SIP"). FWD is not, however, limited to VOIP; if two communicating user programs supported other media (text, video), FWD could provide directory service to them as well.

The idea of "presence" is key here, because any VOIP user could directly create the connection to the other party if the other party's address were known. However, VOIP calling

under FWD currently cannot take place unless the intended recipient of the call is actually connected to the Internet. Thus, what FWD provides is a service to query and return a subscriber's presence state for the communications to follow (in this case, SIP-enabled VOIP), much as signing on to AOL Instant Messenger provides a person with a list of other subscribers and their presence states.

In order to use FWD, subscribers must independently obtain Internet connectivity, like a DSL connection, and VOIP equipment, like a SIP phone. FWD subscribers then obtain FWD numbers and passwords, register their SIP phones with FWD, and configure their SIP phones to work with FWD. When a subscriber's SIP equipment is available for calling, it logs into the FWD server to register its IP address for the FWD directory. This registration step tells FWD that the subscriber is "present." Registration is only valid for a specified time; FWD recommends that the valid period be set to 60 minutes. If the registration is not renewed, FWD will consider the subscriber not to be present.

FWD then works like a free matchmaking or directory service with various functions. For instance, FWD allows subscribers to search for other subscribers using a web page (if they wish to share their number and other information). The subscriber's IP address is not displayed. More important, FWD enables an FWD subscriber to determine whether or not another FWD subscriber is "present," i.e., available for a VOIP call. Subscriber A sends a "SIP invite" to FWD's server -- information stating, in effect, that A wishes to make a SIP call to subscriber B. The SIP invite also contains information about A's calling capacities, such as whether A can handle certain forms of compression or media (voice, video, etc.).

If B has registered his or her presence, FWD determines whether B is still present, looks up B's location, and then forwards the SIP invite to B's SIP endpoint. Meanwhile, the FWD

server sends A an acknowledgment that it is processing. When B receives the SIP invite, receipt is acknowledge by sending a "ringing" message back to FWD, which FWD then forwards to A. If B chooses to respond, B sends an answer message to FWD, which is forwarded to A. Among other things, the answer message tells A the correct Internet address for B's SIP endpoint.

At this point, FWD's role in the VOIP "call" is almost over. It is up to A to "call" B, and the call is transmitted and received using A and B's own Internet connectivity. FWD does not handle the actual media stream at all, but it does handle the termination of the call by sending the "sip bye" message.

II. Discussion

A. FWD is not a voice communications service provider.

EFF believes that most of the objections to pulver.com's petition are based on a mistaken understanding of FWD. For instance, some commenters apparently believe that FWD is "a point-to-point broadband [IP] voice communications service." Comments of Department of Justice ("DOJ") and Federal Bureau of Investigation ("FBI"), at 2; id. at 5 n. 12 ("broadband voice service"); see also Opposition of SBC Communications Inc., at 3 (referring to FWD as end-to-end service).

But as described above, FWD is none of these things. FWD does not provide "point-to-point . . . voice communications." FWD simply provides its subscribers with information needed to make a VOIP call, much the same way that phone directories or directory assistance services provide ordinary phone callers with phone numbers. The actual VOIP call (i.e., the conversation itself) is initiated and transmitted without any involvement by FWD.

Accordingly, FWD does not provide "telecommunications" or "telecommunications service," and cannot be a "telecommunications carrier" under the Act.

B. Granting pulver.com's petition will not interfere with pending proceedings.

Some commenters have suggested that pulver.com's petition is premature. EFF believes that there is no conflict between pulver.com's petition and pending proceedings regarding wireline and cable broadband Internet access. *In the Matter of Appropriate Framework for Broadband Access to the Internet over Wireline Facilities, etc.*, 17 FCC Rcd. 3019 (Feb. 15, 2002); *In re Inquiry Concerning High-Speed Access to the Internet over Cable and Other Facilities, etc.*, Declaratory Ruling and Notice of Proposed Rulemaking, 17 FCC Rcd. 4798 (March 15, 2002). The pending broadband proceedings focus on issues relating to Internet connectivity providers. But pulver.com's petition is a simple request that raises no new issues, because FWD provides no Internet connectivity.

As suggested above, FWD is best thought of as a kind of directory service. The Commission has not previously contemplated or even suggested that such a service would be subject to Title II regulation. The Commission has previously addressed issues relating to VOIP calling in its Report to Congress, *Federal-State Joint Board on Universal Service*, FCC 98-67, 13 FCC Rcd. 11501 (April 10, 1998). With respect to "computer-to-computer" IP telephony, the Commission noted that the ISP is not in any meaningful sense "provid[ing]" the voice telephony to the subscriber, and cannot be subject to Title II on that basis. Id. at ¶ 87. As the Commission put it: "In the case of 'computer-to-computer' IP telephony, individuals use software and hardware at their premises to place calls between two computers connected to the Internet. The IP telephony software is an application that the subscriber runs, using Internet access provided by its Internet service provider." Within this picture, FWD plays no role in originating or transmitting the actual VOIP call.

The Commission was less sure about "phone-to-phone" IP telephony, deferring any "definitive pronouncements." Id. at ¶88. However, the Commission tentatively defined "phone-to-phone" IP telephony as services in which the provider: (1) holds itself out as providing voice telephony or facsimile transmission service; (2) does not require the customer to use CPE different from that CPE necessary to place an ordinary touch-tone call (or facsimile transmission) over the public switched telephone network; (3) allows the customer to call telephone numbers assigned in accordance with the North American Numbering Plan, and associated international agreements; and (4) transmits customer information without net change in form or content.[1] Ibid. None of these conditions is true for FWD.[2]

Fundamentally, FWD's role is a very large step removed from either of these situations, because it does not even transmit the data that constitutes the VOIP call. Although the notion of "Internet application" is not clearly defined, EFF believes that it is reasonable to think of FWD as an Internet application for directory services, not as an Internet application for VOIP calling.

Accordingly, there is no possibility that granting pulver.com's petition will engage the "telecommunications carrier" issues raised by DOJ/FBI. For instance, DOJ/FBI express concern that "[a]lthough pulver.com claims not to provide the 'access' element of its FWD Internet voice

[1] Without expressing any opinion here as to whether the "without net change in form or content" criterion is reasonable, EFF notes that the Commission has previously stated that "information services" do not merely refer to "services that transform or process the content of the information transmitted by the end-user" but rather that "the statutory definition . . . requires only that an information service transform or process 'information.'" *Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as Amended*, 11 FCC Rcd. 21905, at ¶ 104 (1996).

[2] EFF does not express any opinion here as to whether the Commission's suggested definition of "phone-to-phone" IP telephony is a proper basis for regulation. For instance, phone-to-computer and computer-to-phone IP telephony would be "information services," because in both cases a gateway would provide protocol conversion and processing (translating from voice to IP packets, or vice versa). Would combining them to produce phone-to-phone IP telephony, during which any protocol conversion done at one point in the call is undone at another, result in mere

service, it nevertheless provides key elements needed to facilitate such service, and therefore the issue of pulver.com's regulatory status is inextricably woven into the Broadband Proceedings." DOJ/FBI Comments at 5 n. 12.

This statement suggests a fundamental misunderstanding of how FWD works. First, it is incorrect to say that pulver.com provides any voice service through FWD. As explained above, FWD does not transmit any voice data. Second, while FWD does facilitate SIP calling, it does so much the same way that "411" assistance converts a name and city to a PSTN location or phone number that one can use to call directly.

EFF emphasizes that SIP phone users are fully able to call any other user of a SIP phone on the Internet if they know the domain name or IP address of the other's host, or a more capable SIP URL. FWD users, on the other hand, can only reach other FWD subscribers through FWD. Thus, FWD functions almost identically to the Internet's DNS translation service or Instant Messaging ("IM"). Comments of Qwest Communications, Inc., at 4; id. at Ex. 1-3.

For example, the numeric IP ("Internet Protocol") address of EFF's website is http://209.237.229.14. An Internet user can connect to EFF's website without using DNS translation. But numeric IP addresses are hard to remember, so Internet users normally refer to the website as http://www.eff.org. When they do so, a DNS server translates that easy-to-remember address into the numeric IP address. The point is that a person can reach EFF's website either way, with or without DNS translation.

With SIP, if a user knows the numeric IP address of the intended recipient of the VOIP call, he or she can call without using FWD. FWD simply allows FWD subscribers to use

---

"telecommunications"? See n. 1. Further complicating matters, in a distributed environment the firms providing the two services might not even be aware of each other.

telephone-like 5- or 6-digit numbers to locate and call other FWD subscribers, much as DNS translation allows Internet users to use http://www.eff.org instead of http://209.237.229.14.

Finally, the notion that the broadband proceedings are implicated if FWD "provides key elements needed to facilitate [voice] service" reaches far too broadly. "Facilitation" is not a useful concept here. Consider Internet search engines like Google. Today, given the sheer size of the Internet, it is difficult to locate relevant websites without search engines, and they therefore "provide key elements needed to facilitate" Internet use. Yet that fact could not conceivably bring search engines, which are mere Internet applications, into the broadband proceedings. The DOJ/FBI's concerns -- the implications of the Commission's regulatory classifications under the Telecommunications Act for classifications of "telecommunications carriers" under the Communications Assistance to Law Enforcement Act -- are not at issue here.

Accordingly, there is no reason to be concerned that granting pulver.com's petition will prejudge any issues in the wireline broadband or cable broadband proceedings.

III. Conclusion

EFF believes that the pulver.com petition should be granted.

Respectfully submitted,

THE ELECTRONIC FRONTIER FOUNDATION

By: /s/ Lee Tien

Lee Tien
Senior Staff Attorney
Electronic Frontier Foundation
454 Shotwell Street
San Francisco, CA 94110
(415) 436-9333 x 102
<tien@eff.org>

Date: April 1, 2003